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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 718

COMMERCIAL NATIONAL BANK IN SHREVEPORT,
Petitioner,

versus

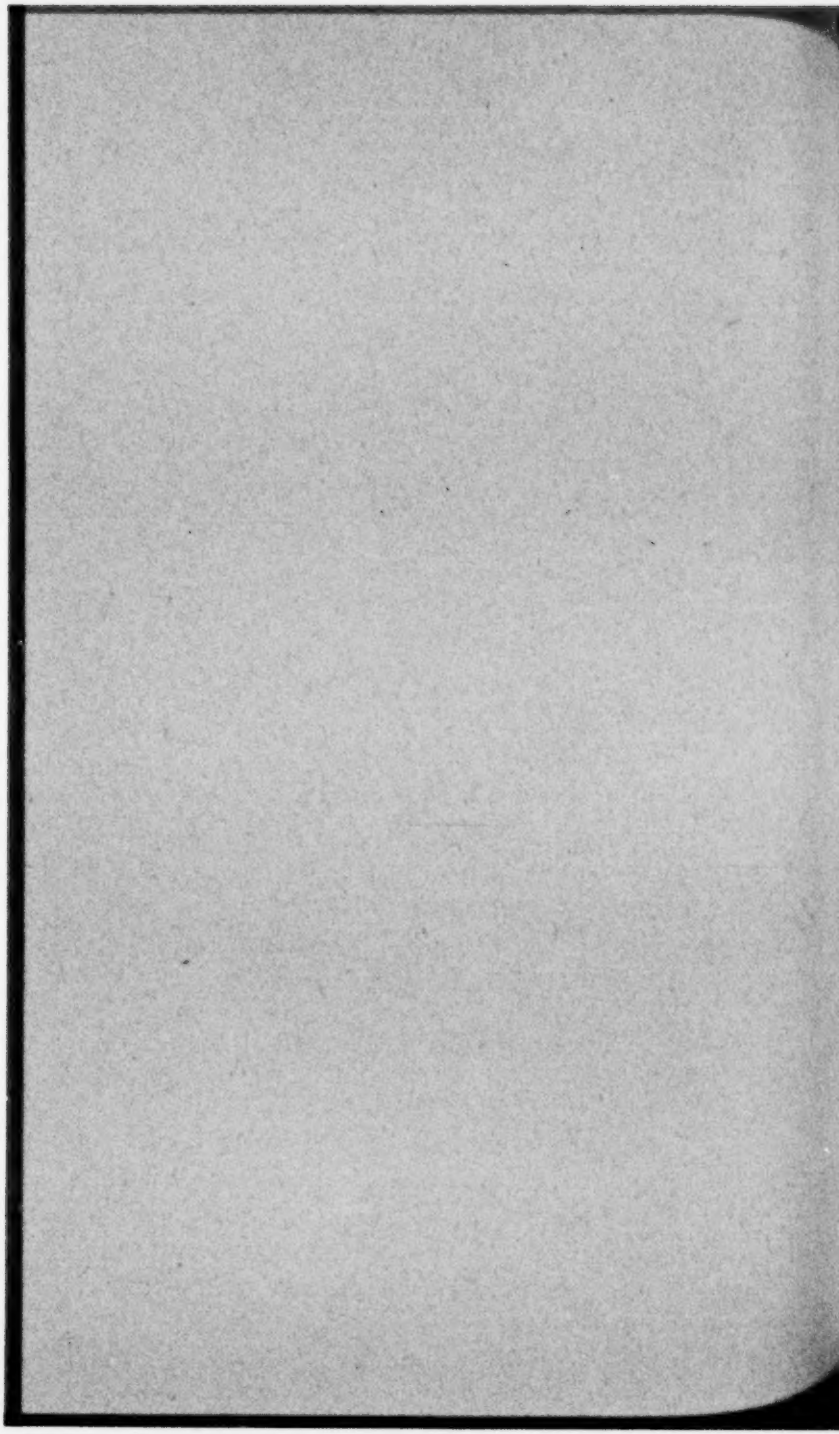
R. C. PARSONS, RECEIVER OF COMMERCIAL NATIONAL BANK OF SHREVEPORT,

And

RANDLE T. MOORE, ET ALS., AS STOCKHOLDERS COMMITTEE OF COMMERCIAL NATIONAL BANK OF SHREVEPORT,
Respondents.

REPLY BRIEF FOR PETITIONER.

SIDNEY L. HEROLD,
SIDNEY M. COOK,
Attorneys for Petitioner.



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The burden of respondents' argument is that the judgment sought to be reviewed is interlocutory. Such fact, however—as the authorities cited in their own brief on pages 8 and 9 demonstrate—has never operated even in the early days of discretionary review, as a barrier to this court's exercise of its power to supervise and review

judgments of Circuit Courts of Appeal; and it would seem that the writ would now the more readily be granted under the recent statutes further broadening the discretionary jurisdiction of this Court. Respondents argue that under the decree of the Circuit Court of Appeals

> "the case goes back for an entirely new trial"(1), (respondents' brief, page 9),

but that statement does not militate against the argument that what the Circuit Court of Appeals assumed to do proceeded from its departure, not only from orderly rules of judicial procedure, but from its overstepping the jurisdictional limits assigned to an appellate court. The rights of a litigant may be equally violated, and the rules of orderly procedure equally as disregarded by an interlocutory as by a final judgment. May we briefly review the situation under which the case was presented to the Circuit Court of Appeals:

The suit is not one for a general accounting, but upon certain specified causes of action, each of which, so the Receiver alleged, had been the cause of hitherto improper accounting. Upon one of those asserted causes of action (that relating to the so-called "tax savings", and its subsidiary claim to interest thereon) respondents had judgment in the District Court. Upon another asserted

(1) Whether, by this, counsel mean that the result of the new trial is not compelled by the expressions of the Circuit Court of Appeals, their brief does not make certain; but even so it is felt that petitioner may very properly apprehend a future contention that they were again in error, as they now say they were (their brief, page 18), in respect of the matters conceded by them in the trial court and on appeal.

cause of action, *i. e.*, that based upon the contention that the clause in the contract (R. 18) providing for a charge of 6% per annum interest on Class B assets, was illegal or usurious, the District Court rejected the demands of the plaintiff and intervenor. It did so after the issue had been abandoned by the express declaration of counsel that upon study they had so construed the contract as to convince them that the provision was valid and enforcible.

As to another of these complaints, *i. e.*, that the One Million Dollar note was without consideration, the District Court, upon a like abandonment, based upon counsel's construction of the contract and the surrounding facts, denied relief.

The judgments on these concrete issues in favor of the present petitioner and against the respondents, were never appealed from, and the delay for appeal had long since elapsed when the case was submitted in the Circuit Court of Appeals.

Nevertheless respondents argue (their brief, page 10) that the absence of cross-appeal was no barrier to that which the Circuit Court of Appeals assumed to do. The cases cited sustain no such doctrine. Whatever trial *de novo* may be had is necessarily confined to the limits of the issues raised by appellant. Counsel's misinterpretation of *Langnes v. Green*, 282 U. S. 531, needs no answer, since this Court has expressly disposed of that contention in *United States v. American Express Co.*, 265 U. S. 425, and

in *Helvering v. Pfeiffer*, 302 U. S. 247, 251. The rule is not merely one of procedure—it is one of jurisdiction. And, as this court said in the *Morley Construction Company* case, 300 U. S. 191 (an Equity appeal), it is "inveterate and certain"; and forbids revision of findings, whether of law or of fact, in behalf of an appellee, not cross-appealing, where such revision "carries with it, as an incident, a revision of the judgment".

Of course, the appellate court had authority to *sustain* the decree below by any reasoning, even though inconsistent with that upon which the trial court's decision had been based. It possessed no power, however, to enlarge the rights of the appellee, or to lessen the rights of appellant. And manifestly the appellate court possessed no power to decide upon issues abandoned below, and formally declared by appellee to be no longer matters of controversy.

And it is to be borne in mind that what counsel for the respondents did in the lower court proceeded, not from mere expression of abstract law; their conclusions arose from a study of the contract in the light of its applicable surroundings and their admissions were not merely of law, but of conclusions derived from the law and the facts.

Disregarding therefore, the fact that its appellate jurisdiction had never been invoked by respondents, and likewise disregarding the admissions that the matters in question had long since ceased to be issues, the Circuit

Court of Appeals has here assumed *sua sponte* to do what no federal intermediate appellate court has any right to do, consonant with orderly procedure; for which reason it is respectfully submitted that the interposition of this court's supervisory power is here peculiarly required.

Respectfully submitted,

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